

***United States Court of Appeals  
for the Second Circuit***



**BRIEF FOR  
APPELLANT**





ORIGINAL

74-1412

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P/S

**United States Court of Appeals**

For the Second Circuit.

UNITED STATES OF AMERICA,

Appellee,

v.

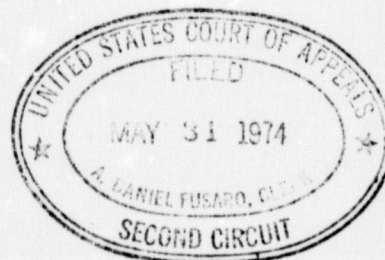
NICHOLAS VOWTERAS and NESTOR VOWTERAS,  
Defendants-Appellants.

*On Appeal From The United States District  
Court for The Eastern District of New York*

**APPELLANTS' BRIEF**

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UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

-----x  
UNITED STATES OF AMERICA,

Appellee,

Docket No. 74-1412

-v-

NICHOLAS VOWTERAS and  
NESTOR VOWTERAS,

Appellants.  
-----x

Statement

The appellants were charged in a four-count indictment with substantively violating Title 18, Section 2 and 201 (b), United States Code, as well as conspiracy under Title 371 thereof.

The indictment accused both appellants with conspiring to and substantively agreeing to bribe a Revenue Agent in connection with an official audit of the 1971 corporate income tax return of the Argo Compressor Service Corporation, a family corporation.

The appellant Nestor Vowteras was convicted as charged, and the appellant Nicholas Vowteras was convicted of two substantive counts as well as the conspiracy charge.

Both appellants were represented at trial by Benjamin Lewis, and thereafter Jacob P. Lefkowitz represented the appellant Nestor Vowteras.



The United States of America has been represented by the United States Attorney for the Eastern District of New York, by Paul Bergman, an Assistant United States Attorney.

Each appellant was sentenced to imprisonment for one (1) year, the execution of ten (10) months of which was suspended, and each appellant placed on probation for the said period.

### STATEMENT OF FACTS

The appellants, who are brothers, together with Murray Baron, their accountant, proceeded to trial before Judge Orrin G. Judd and a jury in the United States District Court for the Eastern District of New York.

Prior to trial, an in camera hearing was held at which time the Court inquired of the appellants as to their joint representation. Their attorney stated that the appellant Nicholas Vowteras would testify and that he "couldn't see what Nestor could add except exacerbate the transcript." (9B)\*

The Court thereupon observed that Nicholas Vowteras' testimony would tend to minimize his participation and inculpate his brother, Nestor.

The Court then observed that:

" You know, Mr. Lewis, I am worried about this. Each man goes to jail separately if they go. I don't know if a businessman who corrupts agents has to go to jail. If even for a short time. I sent a labor leader out in Long Island to jail for sixty days, and then it was cut. I have to treat him the same way I treat a Black man who violates the law. It is quite possible that the brothers may split some time and get separate lawyers on appeal." (10B)

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The prefix "B" refers to the minutes of the in camera proceeding of the morning of November 27, 1973 and which are set forth in the appendix.



Mr. Lewis responded that so far as trial strategy was concerned he made the decision but 'as far as choosing attorneys, I let them make the decision. " (10B - 11B)

The Court then properly observed that it had the duty of satisfying itself that no conflict of opinion was likely to result. It did, however, note that a conflict was possible in this prosecution (11B) and commented:

" I am inclined to say you should both have a little more time to consider this. It is my judgment that maybe there is a conflict of interest. Maybe Mr. Nestor has the most at stake, because his brother's testimony . . . " (13B)

Thereupon Nestor Vowterras stated:

" Why don't we take a little more time? Maybe we are on the wrong track. Maybe we are not thinking right. " (13B)

The Court then responded:

" Let Mr. Nestor come back at 2:30 and tell me whether he has any misgivings. " (13B)

Nestor Vowterras did return at that time and the Court inquired of him as to whether he had sufficient time to think about the matter, the Court posed the following query:

" I pointed out this morning it might be possible that your brother's testimony would convince the jury that he was innocent, and that your not testifying might result in your being convicted. Have you decided if you want a separate lawyer? " (D1)

Nestor Vowteras then responded that he had decided to remain with Mr. Lewis.

The Court again stated that he had the right to then apply for a separate lawyer and to have an adjournment to be sure that he was waiving that right (D1)

Nestor Vowteras then responded "I'm waiving that right, sir." (D1)<sup>xx</sup>

The Court then warned him that:

" If you're convicted and if there is another lawyer who comes in to represent you and he argues that you should have had a separate lawyer, I want you to know, now is the time." (D2)

Nestor then answered, "that's right. You mentioned it to me enough times." (D2) (Emphasis Added)

The Court thereupon excused Nestor and Nicholas Vowteras was interviewed and apprised of the former's wish to be represented by Benjamin Lewis. The Court observed that Nicholas had the right to ask for time to get another lawyer or have Nestor obtain another lawyer.

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xx The prefix "D" refers to the minutes of the in camera proceedings of the afternoon of November 27, 1973, and which are set forth in the appellant's appendix.



The in camera proceedings were then terminated and the court stated in open court:

" I have questioned both brothers separately, and I pointed out that either one may wind up going to jail while his brother is acquitted, and they both said they want you to represent them both.

I think a man has a right to choose his own lawyer. I have told them I would give them an adjournment if they want to get separate counsel.

Mr. Lewis: May I say I appreciate the Court's indulgence.

The Court: Look, I am trying to protect myself.

Mr. Lewis: And the rights of the clients.

The Court: And the clients' rights to be represented. I think there are also risks in having two brothers represented by separate counsel as if they were divergent.

Mr. Lewis: It's a very difficult decision.

The Court: I'm going to let you represent them both. "

(D3)

And at 8D:

" I have talked briefly with both Mr. Nestor Vowteras and Mr. Nicholas Vowteras and pointed out the possibility of conflict, and they have waived any rights they may have to have it delayed to get separate counsel, and I think that the right to have counsel of your own selection plus the risk that may be involved in having two brothers appear to be struggling between each other justifies my permitting Mr. Lewis to continue. "

The proof as adduced by the Government in support of the indictment can be, as initially applicable to the appellants, synthesized in the following narration.

Kenneth Cooley, a special agent for the Internal Revenue Service, testified that he had been assigned to conduct an audit of the Argo Compressor Service Corporation, the appellant's family corporation, for the fiscal year ending September 30, 1971.

After an initial examination of the tax return, most of the morning was expended in an analysis of the gross receipts. Thereafter the witness related that he was taken to lunch by Murray Bacon, the corporate accountant, and on returning to the corporate offices was told by the latter that "These guys are probably going to make you some kind of part time offer (S. M. 84) "that this is the way they work, I shouldn't be alarmed." (S. M. 86) <sup>xxx</sup> Upon making further inquiry as to the meaning of a "part time offer", the witness related that Bacon said that the air compressor trade was a very competitive industry and that the Argo Compressor Service Corporation did not get to be a corporation doing a million and a half dollars in sales "unless they were to pay off and do a lot of entertaining, and this is the way they attained their present sales status." (S. M. 88-89)

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xxx The prefix "S. M." refers to the stenographic minutes of the trial.



The witness further related that Baron said that the appellants "would be glad to show their appreciation for any consideration I could offer them in the area of travel and entertainment and commission expense." (S.M. 89). Thereafter he was offered and declined a portable air compressor.

A subsequent meeting was held at which time Agent Cooley was equipped with electronic transmission equipment and inquiry was focused upon the corporate commission expense account. An analysis thereof revealed that some \$59,000.00 in commission checks were drawn to cash and endorsed by either of the appellants.

The witness further testified that he told Baron that some substantiation or secondary documents was necessary in order to show that the sums claimed to have been paid as commissions were in fact done so. Baron allegedly replied that the recipients of the commission were purchasing agents, who wanted to be unidentified and paid in cash and thus he would be unable and unwilling to furnish the names of the recipients.

A continued audit occurred on December 21, 1972, at which time there was a request for specific invoices, as well as an examination of promotional and selling expenses.

The witness continued that he had lunch that day with Mr. Baron, with the latter stating that he had submitted a fake

financial statement to a bank so that the appellants could continue their high credit line. When the Court queried the relevancy of this, counsel for Baron successfully objected to it being stricken.

The witness further related that the appellant Nestor Vowteras told him that he could not and would not give him the names of the people who received commissions.

During the course of the audit, Baron was alleged to have endeavored to give a carton of liquor to Cooley, showed him a piece of paper with the number 5,000, and thereafter the appellant Nestor Vowteras stated "5 grand." Additionally, Nestor Vowteras was alleged to have stated that there was five hundred (\$500.00) dollars in the carton of liquor, that he would go down to the bank, get the other \$4,500.00, give it to him in an envelope and eventually did so.

A subsequent meeting was had between Cooley and the appellants at which time the former alleged that he received ten thousand (\$10,000.00)dollars.

The foregoing together with the introduction into evidence of various recordings and transcripts of conversations constituted the Government's case.

A motion for a judgment of acquittal was made and denied.



Baron testifying on his own behalf denied any intent to offer a bribe, a part-time position, an air-compressor, or indeed did anything save engage in hard bargaining on behalf of the appellants, with whom he had a poor client-accountant relationship. He alleged that the appellant Nestor Vowter was asked him to bring the bottle of liquor, but that he did not know that it contained \$500.00, denied ever writing the figure \$5,000.00 or knew anything at all about the alleged balance of \$14,500.00 being passed to Cooley. He further related that he had refused to prepare or sign the false fiscal report that the appellants had submitted to their bank.

The appellants called Howard Aschner, an Internal Revenue Service agent, a member of the Review Staff thereof, who testified that as a field revenue agent he had previously audited the returns of the Argo Compressor Corporation, and never been offered any bribe or impropriety.

Harvey Gottlieb, the Group Manager of the Brooklyn District of the Internal Revenue Service, testified as to the operation of the foregoing.

Nicholas Vowter was, who together with Nestor interposed a defense of entrapment, appeared as a witness on his own behalf, testified that on October 11, 1972, he met Agent Cooley at the corporate offices and offered to sell him an air compressor "at cost". On a subsequent occasion and in the presence of Baron he sought advice as to how the problem of commission payments could be corrected, but at

no time invited or solicited the payment of a bribe. He admitted that he refused to give Cooley the names of the recipients of commissions inasmuch as they would lose their jobs.

Nicholas Vowteras testified that on December 22, 1972, he had a conversation with his brother Nestor wherein the latter stated that he had paid \$5,000.00 to Agent Cooley. He conceded that because of his close relationship with Nestor he did not notify the police or the F. B. I.

The Government conceded that Nicholas Vowteras was not present when any money was passed. (S. M. 1138).

On cross-examination Nicholas Vowteras stated that Nestor told him that he had "made a settlement for \$15,000.00" (S. M. 1210)

Michael Sotirbos, the President of Ariston Interior Designer Inc., appeared as a character witness on behalf of the appellants as did Nicholas Tsoucalas, a Judge of the Criminal Court of the City of New York.

Nestor Vowteras did not testify on his own behalf.

A motion for a judgment of acquittal on behalf of both appellants was then made and denied.

The court thereupon charged the jury which returned a verdict of not guilty on all counts as to Murray Baron; guilty on all counts as to the appellant Nestor Vowteras; guilty on counts one



(conspiracy) and four (the substantive count as to the \$10,000.00 payment) and not guilty on the remaining counts as to Nicholas Vowteras.

A motion for a judgment of acquittal notwithstanding the verdict of the jury, pursuant to Rule 29 of the Federal Rules of Criminal Procedure and in the alternative for a new trial pursuant to Rule 33 thereof was timely made on behalf of the appellants and denied.

A motion for a new trial pursuant to Rule 33 and Title 18, United States Code, Section 4244 was also made on behalf of the appellant Nestor Vowteras and likewise denied.

## STATUTES INVOLVED

### Title 18

#### § 2. Principals

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

June 25, 1948, c. 645, 62 Stat. 684; Oct. 31, 1951, c. 655, § 17b, 65 Stat. 717.



**TITLE 18, SECTION 201 (b)**

**Whoever, directly or indirectly, corruptly gives, offers or promises anything of value to any public official or person who has been selected to be a public official, or offers or promises any public official or any person who has been selected to be a public official to give anything of value to any other person or entity, with intent ----**

**(1) to influence any official act; or**

**(2) to influence such public official or person who has been selected to be a public official to commit or aid in committing, or collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or**

**(3) to induce such public official or such person who has been selected to be a public official to do or omit to do any act in violation of his lawful duty.**

## STATUTES INVOLVED

### TITLE 18, UNITED STATES CODE, SECTION 371

#### § 371. Conspiracy to commit offense or to defraud United States.

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. (June 25, 1948, c. 645, § 1, 62 Stat. 701.)



POINT ONE

THE MOTION OF THE APPELLANT, NESTOR VOWTERAS,  
FOR A NEW TRIAL PURSUANT TO RULE 33 OF THE  
FEDERAL RULES OF CRIMINAL PROCEDURE SHOULD  
HAVE BEEN GRANTED.

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The appellant Nestor Vowteras timely moved for a new trial predicated on the newly determined mental disability. The thrust of the motion was (1) that Nestor Vowteras was not competent to stand trial; (2) that he did not competently waive the right to effective counsel in the pre-trial hearing conducted by the trial court pursuant to this Court's holding in DeBerry v. United States, 487 F. 2d 448 (2nd Cir. 1973); and (3) that had defense counsel been apprised of the mental condition of Nestor Vowteras, even if it was not of the level so as to constitute incompetency, it could have been considered by the jury in determining the intent, state of mind, and preexistent disposition to participate in a criminal venture within the confines of the entrapment defense.

In support of the foregoing Benjamin Lewis, the trial attorney for the appellants, submitted an affidavit setting forth that he was unaware of Nestor's mental condition and that had he been so aware then his advice may well have been different both as to the question of separate counsel and defense strategy.

Dr. Hyman G. Weitzer, Nestor's psychiatrist, also submitted an affidavit setting forth that he had been initially consulted in 1955

and found Nestor to be suffering from a recurrent depressive state during which he would experience faulty judgment. He further set forth that he had read the transcript of the November 27th in camera proceedings before Judge Judd and concluded that:

" Although I was personally not present at the time, it would be my impression that when Nestor was advised by Judge Judd of the serious nature of the conflict of interest herein, and, in effect, having been told it would be likely that he might be convicted if he did not retain separate counsel, he perceived this as a threat to his relationship to his brother rather than the obvious conclusion that he might or might not be convicted and possibly go to jail.

Nestor Vowteras has always had a confused concept of himself in relationship to his brother. He undoubtedly considered it a disloyalty to have separate lawyers. He was unable to bring himself to the choice of his own counsel because of his neurotic sense of loyalty. He lacked the capacity at the time to choose for his own best interest because of this intense sense of loyalty and in so doing acted against Judge Judd's obvious warning. His mental state may well have been so confused that he was unable to understand the significance of choosing his separate counsel.

It is my considered opinion, knowing him as I do over an extended period of time, that Nestor Vowteras would be torn by the sense of loyalty to his brother and the depressive nature of his personality in times of stress so that he would not likely make a competent decision as to



whether or not he should obtain separate counsel to represent him at the trial. In fact, I would doubt that he was capable at that time of making any rational judgment concerning any unfamiliar matter of any importance."

In addition to the foregoing Dr. Louis S. Ferris set forth in an affidavit that he has been treating Nestor Vowteras since 1970 and that the latter exhibited complaints which established a classic picture of Manic Depressive Disease, necessitating the prescribing, on many occasions, of various psychotropic drugs.

Dr. Ferris diagnosed the type of Manic Depressive Disease as of a psychotic nature with paranoid traits, having accused friends and family of unrealistic actions totally out of touch with reality and of having made irrational judgments. Moreover that he had seen Nestor Vowteras in severe depression to the point of a catonic state during November and December of 1973, and on November 3 and November 7, 1973 had found it necessary to prescribe Lithium as a specific for manic depressive reactions.

Dr. Ferris then concluded that after having read the transcript of the in camera proceedings on November 27, 1973, and evaluated the subsequent factions of Nestor Vowteras in consulting with Nicholas Vowteras and their attorney, that Nestor Vowteras was at that time incapable of making any rational judgment and incapable of making a competent decision as to whether or not he should obtain

separate counsel to represent him at the trial.

The trial court heard oral argument in support of the motion wherein a specific application was made for the appointment of a psychiatrist or for a hearing as to Nestor's mental competence.

The court held that when it conducted the in camera proceedings it did not observe anything that would cause it to question Nestor's mental alertness and denied the application.

This Court has recently held in DeBerry v. United States, supra, that when there is joint representation in a criminal prosecution the trial court must inquire as to whether there is a conflict of interest and the propriety of such representation. Naturally even though there be a conflict of interest as between the defendants, the right to solitary representation can be knowingly and properly waived. However, it is submitted that in the instant cause, there could not be a waiver because of a preexistent mental disability.



POINT TWO

THE COURT FAILED TO COMPLY WITH THE PROVISIONS  
OF TITLE 18, UNITED STATES CODE, SECTION 4244 AS  
TO A MENTAL EXAMINATION FOR THE APPELLANT,  
NESTOR VOWTERAS.

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Section 4244 of Title 18 provides that if at any time before the imposition of sentence, there exists reasonable cause to believe that the accused is then insane or otherwise so mentally incompetent as to be unable to understand the proceedings against him or properly assist in his own defense, then either the United States Attorney, the Court, or the accused himself may file a motion for a judicial determination as to his competency setting forth the grounds for such belief.

Upon the filing of such motion the Court shall cause the accused to be examined as to his mental condition by at least one qualified psychiatrist who shall report to the Court. If the report of the psychiatrist indicates a state of present insanity or such mental incompetency, the court shall hold a hearing upon due notice. (Emphasis supplied).

It is submitted that in view of the motion filed on behalf of Nestor Vowteras and the diagnosis and findings of Drs. Weitzer and Ferris, that there was reasonable cause to believe that Nestor Vowteras was mentally incompetent so as to properly assist in

his own defense. The failure and refusal of the trial court to thus order a mental examination constituted reversible error.

Pate v. Robinson, 383 U.S. 375 (1966).



### POINT THREE

EVEN IF THE APPELLANT NESTOR VOWTERAS WAS  
COMPETENT TO STAND TRIAL, HE WAS INCOMPETENT  
TO WAIVE HIS CONSTITUTIONAL RIGHT TO SOLITARY  
REPRESENTATION BY COUNSEL.

Even if Nestor Vowteras was competent to stand trial, was he competent to waive his Sixth Amendment right to separate and solitary counsel? If he was not so competent then his waiver thereof was constitutionally infirm. For in order to properly waive a constitutional right such waiver must not only be voluntary, but also be an intelligent and competent abandonment of a knowing right or privilege. Johnson v. Zerbst, 304 U.S. 458 (1938). A fortiori a valid waiver presupposes the existence of mental competence to waive.

The test of whether one is competent to stand trial can be deemed to be whether one then has sufficient ability to consult with his attorney with a reasonable degree of rational understanding as well as whether he has a rational as well as factual understanding of the proceedings against him. Dusky v. United States, 362 U.S. 402 (1960); see also United States v. Sullivan, 406 F. 2d 180, 185 (2nd Cir. 1969).

It is submitted that not only is there a distinction between competency to stand trial and competency to waive a constitutional right, but that the latter entails a higher standard. For in

Westbrook v. Arizona, 384 U.S. 150 (1966) the Supreme Court held that the finding of a trial court that the defendant was competent to assist counsel in his defense, did not suffice as a finding that he was also competent to waive such a fundamental constitutional right as the right to the assistance of counsel.

In Sieling v. Eyman, 478 F. 2d 211 (9th Cir. 1973), the defendant contended that he was mentally incompetent to enter a plea of guilty. In fact that neither the competency to stand trial nor the interrogation and colloquy in connection with the entry of a plea of guilty, adequately resolved the question of his competency to waive his constitutional right to trial.

The Court agreed and held at 214:

" We think Westbrook makes it plain that, where a defendant's competency has been put in issue, the trial court must look further than to the usual 'objective' criteria in determining the adequacy of a constitutional waiver. In Westbrook, supra, although the state court had, after hearing, concluded that the defendant was mentally competent to stand trial, the Supreme Court deemed it essential that a further 'inquiry into the issue of his competence to waive his constitutional right to the assistance of counsel . . . ' was required. 384 U.S. at 150, 86 S. Ct. 1320. It was not suggested there, nor has it been in this case, that the state court's determination that the accused was competent to stand trial was incorrect. The clear



implication, then, is that such a determination is inadequate because it does not measure the defendant's capacity by a high enough standard. While the Court did not suggest a standard, it is reasonable to conclude from the Court's language that the degree of competency required to waive a constitutional right is that degree which enables him to make decisions of very serious import."

If Judge Judd had been apprised of Nestor's mental condition, it may well have been likely that he would have refused to accept his waiver and directed that he obtain separate counsel.

It is indeed unfortunate that Nestor's incapacity was not divulged until after verdict. However, there is not the slightest scintilla of evidence or even inference that there was a deliberate concealment thereof. It would, however, be egregious if one suffering from a mental disability of the nature attested to by his physicians were to be treated as though he were competent.

POINT FOUR

THE APPELLANT NICHOLAS VOWTERAS WAS PREJUDICED  
BY PROCEEDING TO TRIAL UNDER THE TOTALITY OF  
CIRCUMSTANCES HERETOFORE SET FORTH

There is no claim that Nicholas Vowteras was incompetent, much the same as there is no evidence whatever that he had knowledge of Nestor's mental condition. However it is patent that he would not have proceeded to trial represented by the same lawyer who was appearing on behalf of an incompetent.

The thrust of DeBerry v. United States, supra, pre-supposes that if one lawyer represents two defendants, the latter are competent. Indeed it would be as incredulous for the clients to knowingly consent to such joint representation as it would be for an attorney to simultaneously represent a competent and an incompetent.

Under these circumstances the consent of Nicholas Vowteras was illusory and he lacked that effective assistance of counsel as mandated by the Sixth Amendment to warrant a fair trial.



**CONCLUSION**

**The Judgment of Conviction should be reversed as  
to both appellants.**

**Respectfully submitted,**

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**THEODORE KRIEGER,  
Of Counsel.**

**AFFIDAVIT OF PERSONAL SERVICE**

**STATE OF NEW YORK,  
COUNTY OF RICHMOND ss.:**

EDWARD BAILEY being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 30 day of May, 1974 at No. 30 Copin deponent served the within Brief upon the US Attorney the deponent herein, by delivering a true copy thereof to him personally. Deponent knew the person so served to be the person mentioned and described in said papers as the therein.

Sworn to before me,  
this day of 19

*William Bailey*  
.....  
**WILLIAM BAILEY**

Notary Public, State of New York  
No. 43-0132945  
Qualified in Richmond County  
Commission Expires March 30, 1975

*Edward Bailey*  
.....  
**Edward Bailey**



